UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

In the Matter of	)	
	)	
The Cincinnati Gas & Electric Company, et al.	)	Docket No. 50-358
	)	
(Wm. H. Zimmer Nuclear Power Station)	)	

APPLICANTS' ANSWER TO MIAMI VALLEY POWER PROJECT'S PETITION FOR RECONSIDERATION OF THE COMMISSION'S ORDER OF JULY 30, 1982

Preliminary Statement

By Order dated July 30, 1982, the Commission exercised its inherent authority to review and reverse the ruling by the Atomic Safety and Licensing Board ("Licensing Board" or "Board"), dated July 15, 1982, accepting eight late contentions relating to quality assurance at the Wm. H. Zimmer Nuclear Power Station. 1/ After an extension of time granted by the Secretary, Miami Valley Power Project ("MVPP") filed on August 20, 1982 a petition for the Commission to reconsider its Order.

The Cincinnati Gas & Electric Company, et al. ("Applicants") oppose the reconsideration sought by MVPP.

1/ The Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC ___ (July 30, 1982), rev'g, "Memorandum and Order (MVPP's Motion for Leave to File New Contentions)" (July 15, 1982).

MVPP has not met the legal requirements for seeking reconsideration of a decision by the Commission, nor has MVPP even addressed this issue. The motion does not attempt to demonstrate any legal error which would be an appropriate basis for reconsideration. Instead, MVPP simply reargues factual matters with somewhat greater elaboration and reiterates its desire to recycle and relitigate the items contained in the Notice of Violation issued on November 24, 1982. However, a motion for reconsideration under 10 C.F.R. §2.771 does not serve the function of permitting a party to reargue or supplement the factual record or to restate its position as to how competing concerns should be balanced. Some assignment of legal error must be made, and none has been made here by MVPP.

In the same vein, MVPP has still failed to meet its legal burden in justifying a reopening of the proceeding. As the Commission stated in its Order, "the staff recognized and the Board ruled that the legal standards for further hearings were not met." 2/ Although MVPP does briefly address the test for reopening, its discussion, particularly its reasons for lateness, clearly lack merit and do not satisfy the Commission's requirements.

The request for reconsideration also lacks substantive merit. Although MVPP makes a belated attempt to flesh out the bases of its contentions as presented to the Licensing

---

2/ Order at 3.

Board, its showing does not meet the real concerns expressed by the Commission in its Order as to why a hearing before the Licensing Board on quality assurance matters at Zimmer would be inappropriate and counterproductive. If anything, the factual arguments by MVPP and its counsel, Government Accountability Project ("GAP"), merely serve to underscore the wisdom of the Commission's original course of action. The motion proves again that there is absolutely nothing to be gained by rehashing at a hearing, as MVPP would prefer, all of the items covered by the Notice of Violation issued by the Director of Inspection & Enforcement on November 24, 1981 in assessing a civil penalty to which the Applicants have acceded.

The bulk of MVPP's argument is directed at the NRC Staff in an attempt to discredit the integrity and professional competence of Staff personnel involved with Zimmer. The Commission has made it clear, however, that it will carefully scrutinize the Staff's activities in its review of Zimmer. If the Commission is dissatisfied with the performance of certain individuals within the Staff, the appropriate solution is to replace those individuals with others in whom the Commission can repose greater confidence, not "hearings for the sake of hearings." There is no magic in administrative hearings to resolve technical matters. For these reasons, as discussed more fully below, the request for reconsideration should be denied.

Argument

I. MVPP Has Failed To State Legal Grounds For Seeking Reconsideration Of The Commission's Order.

Following its review of the entire record in this proceeding with regard to quality assurance matters, the Commission determined as a matter of law that the Licensing Board had not sufficiently justified its order reopening the record to consider sua sponte eight new quality assurance contentions as Board issues. MVPP challenges this decision as an abuse of discretion, citing the evolution of the legal standard for sua sponte review by licensing boards and the history of the Staff's review of quality assurance matters at Zimmer. MVPP argues that sua sponte review was warranted in this instance.

Under the Commission's rules in 10 C.F.R. §2.771 and the precedents thereunder, a party seeking reconsideration must state a basis for legal error. It is insufficient simply to allege that the Commission abused its discretion in weighing all of the relevant considerations or in adopting one interpretation of the factual record over another. In the instant case, the Commission has taken all steps necessary to stay abreast of quality assurance matters at Zimmer. The Commission therefore is fully cognizant of the state of the record, including any internal differences among the Staff concerning the appropriate measures to remedy past quality assurance deficiencies at Zimmer. The additional averments and documents belatedly proffered by

MVPP do not, under these circumstances, provide the Commission with any particular insight and certainly do not establish a legal basis for reconsidering its reasoned judgment that the Commission should itself oversee the Staff's review of quality assurance improvements at Zimmer.

In this respect, MVPP has overlooked the basic fact that the Commission has itself assumed primary responsibility for overseeing the Staff's actions. As the Commission indicated, "it assigns great importance to the investigation of quality assurance conditions at the Zimmer plant" and has been briefed by Region III and Applicants as well as GAP. 3/ The Commission also noted that it has directed the NRC Staff "that it wishes to be fully informed in order that it can provide guidance and direction when needed." 4/ Although MVPP argues that the Licensing Board should have been permitted to pursue these matters sua sponte, it presents absolutely no legal basis for asking the Commission to reconsider its inherent, discretionary power to oversee the matter itself. Accordingly, no legal assignment of error has been made.

In a number of decisions, the Commission and the Atomic Safety and Licensing Appeal Board have discussed the circumstances in which reconsideration is appropriate. The

---

3/ Zimmer, CLI-82-20 (slip op. at 1-2).

4/ Id. at 2.

Commission has held that reconsideration will not be granted when sought on the basis of essentially the same arguments previously made, even when supported by additional documents. The Commission so stated in the Sheffield proceeding:

> [Licensee] has also moved us to reconsider our Order of June 6. [Licensee's] arguments in support of reconsideration are similar to arguments previously presented. Moreover, [licensee's] motion presents no basis for our reconsideration of arguments made to and considered by us in reaching our initial decision. Thus, there is nothing in that motion which would warrant our reconsideration of the Order of June 6. 5/

In the Summer antitrust proceeding, the Commission also denied a petition for reconsideration where the petitioner urged the Commission to adopt a different view of the factual record, but cited no basis for legal error. 6/ And in the Point Beach proceeding, the Commission likewise denied reconsideration, succinctly stating: "We find in the applicant's submission no sound basis for reconsidering arguments made to and considered by us prior to the rulings contained in our Memorandum and Order of May 6, 1971." 7/

5/ Nuclear Engineering, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980).

6/ Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787 (1981).

7/ Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit No. 2), 4 AEC 678 (1971).

Also in the Point Beach proceeding, the Appeal Board rejected another request for reconsideration, stating that "intervenors do not even attempt to demonstrate the error in our determination that no such basis [for safety concerns] existed." 8/ As the Appeal Board held in the Marble Hill proceeding, reconsideration should be reserved for those cases where the Commission or Appeal Board "is convinced that its declared law is wrong and would work an injustice." 9/

Thus, this case is distinguishable from one like Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650 (1980), where the Commission reconsidered its decision not to review ALAB-603 after being advised by the Staff that "ALAB-603 could have a serious effect on the regulatory process," thereby presenting "serious generic policy matters requiring Commission consideration." 10/ By contrast, the Commission's Order of July 30, 1982 in the instant proceeding involves no generic matters. All relevant policy considerations were known to the Commission at the time of

---

8/ Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 2), ALAB-93, 6 AEC 21, 23 (1973).

9/ Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 260 (1978).

10/ St. Lucie, CLI-80-41, 12 NRC at 652.

its decision and no new policy concerns have been suggested by any party.

As a final factor weighing against MVPP's having met the legal requirements for reconsideration, it is noted that MVPP has now submitted voluminous documents and new affidavits in an attempt to establish its case. 11/ As MVPP itself candidly acknowledges, the bulk of what it now wishes the Commission to consider was not contained in its original pleading, but is only now proffered following the Commission's decision. 12/ The Commission should dismiss out of hand the assertion by MVPP that it was entitled to withhold evidence upon which it relied in seeking a reopening of the proceeding and thereby reserve an opportunity to submit the evidence if reopening were denied. Supplementation of the record by way of a motion for reconsideration is not permitted, since a "party is not entitled to raise on petition for reconsideration a matter which was not [previously] placed in contest." 13/ The

---

11/ MVPP has incorporated by reference its petition to suspend construction of the Zimmer Station, filed concurrently with its motion for reconsideration. In view of the fact that the petition to suspend construction will be referred to the Director pursuant to 10 C.F.R. §2.206, Applicants will not address that particular petition herein, but will respond directly by way of comments to the Director.

12/ MVPP Petition for Reconsideration at 46-48.

13/ Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-477, 7 NRC 766, 768 (1978).

Commission has criticized similar pleading practices in the Summer antitrust proceeding, where it stated that the petitioner's "creation of what may fairly be termed a 'moving target' has made it extremely difficult for the Commission to focus on [the factual allegations]." 14/ In the same context, the Commission also criticized petitioner for presenting "a new and elaborate thesis" to support its case. The Commission stated:

> Motions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced. See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977). They are not the occasion for an "entirely new thesis." Id. 15/

It is submitted that the same approach is equally valid with respect to presentation and argument upon the factual record.

The restrictions upon reconsideration under the Commission's rules are analogous to those under Rule 40, Fed. R. App. Proc., which limits reconsideration to "the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." In several instances, it has been held that reconsideration may not be sought to permit reargument of the same matters. See, e.g.,

---

14/ Summer, supra, 14 NRC at 789.

15/ Id. at 790.

United States v. Doe, 455 F.2d 753 (1st Cir. 1972), vacated and remanded on other grounds, sub nom Gravel v. United States, 408 U.S. 606 (1973); Anderson v. Knox, 300 F.2d 296 (10th Cir. 1962).

Also, the federal courts do not permit reconsideration as a means for supplementing a record with new material. The Court of Appeals in Carr v. Federal Trade Commission, 302 F.2d 688, 692 (1st Cir. 1962), sharply chastised the agency for this practice:

> This is not a case of a party caught in some manner by surprise. It is not even the case of indifferent counsel not versed in every march of the law. In general matters, even though not obliged to do so, we commonly make our own research. But a court cannot be expected to rummage among administrative rulings and consent orders sua sponte when the party most directly involved and knowledgeable makes no suggestion that anything would be found there. In a governmental agency best familiar with its own practice with respect to a matter directly in issue, and now said to be of paramount importance, to make no mention of the subject until after it had lost the case on another ground, if deliberate, is a breach of duty to the court and, if inadvertent, is still inexcusable. The Commission's petition for rehearing raising this allegedly vital point contains no mention of why it was first developed at this late date, let alone any apology for so doing.

The Commission likewise should not sanction a piecemeal approach whereby a request for reconsideration is made to buttress deficient allegations rather than simply elaborate or refine existing legal arguments.

II. MVPP Has Not Satisfied The Commission's Requirements For Reopening A Proceeding.

With regard to the substance of MVPP's showing on whether the record should be reopened, it is reiterated that the Commission, like the Licensing Board, has determined that the legal standards for reopening have not been met. Applicants have already addressed this matter at length in "Applicants' Answer to Motion by MVPP for Leave to File New Contentions" (June 2, 1982), to which Applicants respectfully refer the Commission for the sake of brevity. 16/

Likewise, MVPP has failed to establish that the Commission committed legal error in its finding that sua sponte review by the Licensing Board was unjustified. Here again, Applicants have already discussed this issue in some detail in "Applicant's Suggestion of the Impropriety of Licensing Board's Sua Sponte Review" (July 30, 1982), to which the Commission is also referred. Applicants will, however, respond to particular points raised by MVPP in its petition for reconsideration.

MVPP now flatly states that it "did not submit to the Licensing Board all the evidence it had collected to support

---

16/ Of course, the question of whether reopening on the basis of MVPP's having satisfied the requirements for late contentions under 10 C.F.R. §2.714(a) is not presented, since the Board exercised its sua sponte authority to hear the proposed contentions as Board issues. Accordingly, Applicants see no point in responding to MVPP's discussion of these factors in MVPP's Petition for Reconsideration at 49-51.

its proposed contentions," because, in its view, full divulgence of the information it relied upon in seeking reopening was not "needed." 17/ Applicants submit that the Commission should resoundingly reject this deliberately segmented approach to pleading practice before the NRC, which is wholly inconsistent with the Commission's Rules of Practice as well as the decisions of the Commission and its adjudicatory boards. MVPP has cited no authority which by any fair inference authorizes a party seeking reopening of the record to submit less than all of the information it wishes to place into the record. Indeed, it would be well nigh impossible for a party to argue that the material is "both timely presented and addressed to a significant safety or environmental issue" 18/ without actually proffering the information and explaining its relevance in the context of the request to reopen.

The Appeal Board in the Catawba proceeding has recently provided excellent insight on this point. Intervenors in that case sought to justify the submission of late contentions on the ground that new information had become available. The Appeal Board reaffirmed its "belief that an

---

17/ MVPP Petition for Reconsideration at 46.

18/ Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). This standard was approved by the Commission in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention." 19/ Implicit in this observation is the corollary that any such available information must be proffered by way of a full and timely presentation, and not in bits and pieces according to the intervenor's personal dictates.

MVPP attempts to characterize the Commission's finding that "MVPP did not in its motion to the Board or elsewhere sufficiently identify any new information, its source, or say when it became available" 20/ as a concern over authentication of documents through a sponsoring witness. 21/ MVPP's attempt to create a strawman notwithstanding, it is clear that the Commission was not concerned with evidentiary procedures, but rather with the integrity of the Commission's rules requiring the timely submission of matters which are alleged to justify a reopening of the proceeding. As the Supreme Court stated in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978), "it is

---

19/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ___ (August 19, 1982) (slip op. at 13).

20/ Zimmer, CLI-82-20, (slip op. at 3).

21/ MVPP Petition for Reconsideration at 47.

still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contention."

Under these principles, an intervenor cannot satisfy its important obligations as a party to the proceeding by the submission of only what it perceives to be sufficient information to whet the appetite of the Licensing Board or Commission so as to justify further exploration in a hearing. The Commission's instructions to Licensing Boards "to expedite the hearing process" so that it "moves along at an expeditious pace, consistent with the demands of fairness," [22/] cannot be fulfilled if petitioners and intervenors are permitted to establish unilaterally the degree of compliance with the Commission's rules each may consider appropriate. Accordingly, MVPP has not established good cause for reopening.

III. The Commission Correctly Determined That The Licensing Board Had Not Justified Sua Sponte Consideration Of Quality Assurance Matters.

The arguments presented by MVPP in seeking reconsideration indicate that it does not fully appreciate the rationale of the Commission's decision, including the degree to which the Commission has injected itself into the oversight of quality assurance matters associated with the

---

22/ Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

Zimmer facility. [23] MVPP asserts that the Commission has abused its discretion by restricting the Licensing Board's consideration of quality assurance matters at Zimmer under its sua sponte authority to explore "a serious safety, environmental, or common defense and security matter." [24]

Contrary to MVPP's impression, however, the Commission has not belittled any of the problems regarding quality assurance at Zimmer which have been periodically brought to its attention by the Staff (including the Commissioners' personal staff), and which the Commission has discussed directly with representatives of Applicants and GAP. In point of fact, the Commission expressly stated in its Order that it "agrees with the Board that issues outlined in the [sua sponte] contentions are indeed serious. The Commission has already indicated that it assigns great importance to the investigation of quality assurance conditions at the Zimmer plant." [25] As noted, the Commission also directed the NRC Staff to keep it "fully informed in order that it can provide guidance and direction when needed." [26] On the

---

23/ Initially, MVPP repeats its interpretation of events at Zimmer relevant to quality assurance, all of which the Commission is well aware. Applicants' counterstatement of this background is contained in "Applicants' Suggestion of the Impropriety of the Licensing Board's Sua Sponte Review" at 5-12 (July 30, 1982), to which the Commission is respectfully referred.

24/ 10 C.F.R. §2.760a.

25/ Zimmer, CLI-82-20 (slip op. at 1).

26/ Id. at 2.

other hand, the Commission also determined that the sua sponte issues designated by the Board simply amount to a restatement of problems already investigated by the NRC Staff, which will be resolved "in the course of the ongoing investigation and in the NRC Staff's monitoring of the Applicants' Quality Confirmation Program." 27/

Under the circumstances, the Commission did not improperly restrict the authority of the Licensing Board to review on its own quality assurance concerns at Zimmer. This is not an instance in which a serious safety problem has been left unattended. Rather, the Commission simply concluded that its own monitoring of Staff activities would prove more productive and provide greater assurance of the public health and safety than having the Licensing Board conduct, in essence, another audit of quality assurance at Zimmer in order to confirm for itself the adequacy of the remedial actions undertaken by Applicants in conformance with the Staff's requirements for changes and improvements in quality assurance practices at Zimmer.

The fact that the Commission is itself fully cognizant of the quality assurance issues being resolved at Zimmer and has undertaken to monitor the Staff's progress distinguishes this proceeding from others relied upon by MVPP in which boards were permitted to explore issues sua sponte. Obviously, each incident of sua sponte review by the

---

27/ Id. at 3.

Licensing Board must be judged on its own merits, but there is certainly no justification for accusing the Commission of "an unwarranted attempt to return to the old rule" restricting a Licensing Board's sua sponte authority. 28/ The Commission is well aware of the governing standards for sua sponte review and, while it has a responsibility to permit Licensing Boards to engage in such review where appropriate, it has an equally compelling responsibility to limit such review where it determines it to be unnecessary counterproductive or otherwise not in the public interest. 29/

Under the circumstances, there is little point in responding to the attachments to MVPP's petition. As the documents themselves indicate, the substantive areas they address are well known to Applicants and the Staff. There is nothing more the Licensing Board could do with regard to such matters, ultimately, than to review the Staff's disposition of each of these items. The Commission has indicated, to the contrary, that it will perform this function itself. In any event, the proper focus of the Commission in reviewing the Licensing Board's sua sponte

---

28/ MVPP Petition for Reconsideration at 7.

29/ The Commission's policy for the handling of unresolved safety issues by Licensing Boards on a generic basis is clearly distinguishable. Accordingly, MVPP's reliance upon the line of cases including Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301 (1980), is misplaced.

actions should be upon the bases expressly stated by the Board in raising the eight contentions rather than supplementary documentation upon which the Licensing Board did not base its decision.

Most of the documents are cited in support of an attempt by MVPP at great length to demean the technical competence and professionalism of the NRC Staff. 30/ MVPP also asserts that disagreement existed among the Staff as to whether construction should have been stopped at Zimmer, 31/ and that the NRC Staff has been remiss in not aggressively instigating certain criminal investigations which MVPP believes should be pursued. 32/ MVPP even goes so far as to suggest that the Staff is subject to certain "pressures" from Applicants in its oversight of the Quality Confirmation Program. 33/ Finally, MVPP attacks the Commission's integrity in asserting that the NRC has conducted its regulatory activities "in secret" by arbitrarily withholding

---

30/ See generally MVPP Petition for Reconsideration at 17-33.

31/ Id. at 34-35. In this allegation, MVPP shows its ignorance of the requirements of the Administrative Procedure Act and 10 C.F.R. Part 2 which prohibit the Staff from unilaterally halting licensing activities without an opportunity for hearing before an appropriate tribunal.

32/ Id. at 36-38.

33/ Id. at 39-43.

information sought by a request under the Freedom of Information Act. 34/

Although the Staff can undoubtedly defend itself against each of these allegations, Applicants certainly disagree with the thrust of the onslaught by MVPP against the competence and character of the Staff. It is not, in any event, the function of a Licensing Board to audit the ongoing activities of the Staff in the completion of its ordinary licensing review actions. The Commission should not impose an additional layer of review which would insulate the Commission from its supervision of the matter. If the Commission determines that certain members of the Staff are unqualified to carry out their assigned functions, it should replace them with individuals in whom it can repose greater confidence. Thus, if there were any basis at all for suggesting that the NRC Staff has not fulfilled its independent function to guarantee the public health and safety in a particular proceeding, the Commission's decision to directly oversee the Staff's performance would only be justified all the more.

Applicants do not agree, however, that such a finding is warranted. Only recently, the Commission had occasion to comment again on the adequacy of Staff review as a guarantor of the public health and safety where a request for a hearing had been denied. In Boston Edison Company (Pilgrim

---

34/ Id. at 44-45.

Nuclear Power Station), CLI-82-16, 16 NRC ___ (July 30, 1982), the Commission denied a petition by the Commonwealth of Massachusetts seeking to intervene in a proceeding for modification of the facility's operating license which would implement an order of the Office of Inspection and Enforcement requiring development and implementation of a plan for improvements in management organization. The Commission stated:

> The scope of the action initiated by the Commission may be limited and defined by the Commission. The Commission may limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, at 441-42 (1980). The order in this case limits the scope of a proceeding in this way. 35/

As with MVPP with regard to the Notice of Violation issued on November 24, 1981 by I&E, the Commonwealth in Pilgrim did not disagree with the I&E order, but actually relied upon it as a basis for the alleged need for a hearing. The Commission described the situation as follows:

> The Attorney General does not oppose the issuance of the Order nor does he raise in his petition or brief any suggestion that it is unsupported by the facts it sets forth. Indeed, far from disputing the facts set forth in the Order, the Attorney General recites them to show

---

35/ Pilgrim, CLI-82-16, 16 NRC at ____ (slip op. at 2-3) (July 30, 1982).

> the need for NRC action . . . . If anything, the Attorney General suggests that these facts not only support this Order but also support further NRC action. Consequently, the Attorney General is not entitled as of right to any formal hearing in the proceeding with respect to these concerns. Nor do we believe that, under the circumstances, a discretionary hearing should be held. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). The NRC staff will give full and fair consideration to any of the Attorney General's expressed concerns regarding future actions in this case, and we believe that this informal process will prove to be a satisfactory way of resolving those concerns. If for any reason the Attorney General believes his concerns have not received adequate attention or he desires more formal consideration of them, he may file a request for further enforcement action pursuant to 10 CFR 2.206. Should any Commission analysis or information in a 2.206 petition show that the NRC-ordered modification program has not been either sufficient to address the problems or properly responded to by the licensee, the licensee bears the risk of further action as appropriate. In this way, the Commission believes that the public health and safety has been properly and adequately protected by its actions. 36/

Applicants submit that precisely the same considerations are applicable here in that the Staff will fully and adequately perform its assigned responsibilities

---

36/ Id. at 4-5. See also Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit No. 2), ALAB-30, 4 AEC 685, 687 (1971) (noting that the Staff is authorized by regulation "to investigate thoroughly any additional material that [an intervenor] may wish to forward and take whatever action appears appropriate to protect the public health and safety").

with appropriate guidance and direction from the Commission. MVPP's pleadings before Commission and Licensing Board leave no doubt that MVPP wishes to relitigate the items contained in the Notice of Violation, which are being resolved under the Quality Confirmation Program and related quality assurance improvements at Zimmer. The Commission's recent decision in Pilgrim, however, clearly militates against such a redundant result. 37/

Conclusion

For the reasons discussed above, it is submitted that MVPP has failed to make any appropriate assignment of error as a basis for reconsideration by the Commission of its Order, or to demonstrate that the Commission incorrectly determined that the instant proceeding should not be reopened. The specific items pertaining to quality assurance discussed by MVPP in its petition can and will be

---

37/ Pilgrim, CLI-82-16, supra. Applicants further believe that any reopening based on the items contained in the Notice of Violation dated November 24, 1981 would seriously thwart the Commission's policy favoring voluntary settlement of civil penalty assessments. The discussion of the Commission's related holding in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980), which the Commission again cited in Pilgrim, is contained in "Applicants' Suggestion of the Impropriety of Licensing Board's Sua Sponte Review" at 20-22.

appropriately addressed by the Staff in its review of Applicants' Quality Assurance Program and other improvements in quality assurance practices at the Zimmer facility.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr.
Mark J. Wetterhahn
Robert M. Rader

Counsel for Applicants

September 7, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
The Cincinnati Gas & Electric Company, et al.	)	Docket No. 50-358
	)	
(Wm. H. Zimmer Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Miami Valley Power Project's Petition for Reconsideration of the Commission's Order of July 30, 1982," dated September 7, 1982 in the captioned matter, have been served upon the following by deposit in the United States mail this 7th day of September, 1982:

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stephen F. Eilperin
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard A. Wilber
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge John H. Frye, III
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Frank F. Hooper
Chairman of Resource Ecology Program
School of Natural Resources
University of Michigan
Ann Arbor, MI 48104

Dr. M. Stanley Livingston
Administrative Judge
1005 Calle Largo
Sante Fe, NM 87501

Chairman, Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman, Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Charles A. Barth, Esq.
Counsel for the NRC Staff
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Deborah Faber Webb, Esq.
7967 Alexandria Pike
Alexandria, Kentucky 41001

Andrew B. Dennison, Esq.
Attorney at Law
200 Main Street
Batavia, Ohio 45103

Lynne Bernabei, Esq.
Government Accountability
Project/IPS
1901 Q Street, N.W.
Washington, D.C. 20009

John D. Woliver, Esq.
Clermont County
Community Council
Box 181
Batavia, Ohio 45103

Brian Cassidy, Esq.
Regional Counsel
Federal Emergency
Management Agency
Region I
John W. McCormick POCH
Boston, MA 02109

David K. Martin, Esq.
Assistant Attorney General
Acting Director
Division of
Environmental Law
Office of Attorney General
209 St. Clair Street
Frankfort, Kentucky 40601

George E. Pattison, Esq.
Prosecuting Attorney of
Clermont County, Ohio
462 Main Street
Batavia, Ohio 45103

William J. Moran, Esq.
Vice President and
General Counsel
The Cincinnati Gas &
Electric Company
P.O. Box 960
Cincinnati, Ohio 45201

Docketing and Service
Branch Office of the
Secretary U.S. Nuclear
Regulatory
Commission
Washington, D.C. 20555

Mark J. Wetterhahn

cc: Robert F. Warnick
Director, Enforcement
and Investigation
NRC Region III
799 Roosevelt Road
Glen Ellyn, Illinois 60137